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SUBJECT: HOW TO ADDRESS CHINA'S DRAFT POSTAL LAW RESTRICTIONS ON
U.S. EXPRESS DELIVERY COMPANIES

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¶11. (SBU) SUMMARY AND ACTION REQUEST: China's recent release of its draft revised postal law confirmed the pre-release concerns of the global express delivery industry, including U.S. companies FedEx and UPS. If enacted, the law would exclude foreign express delivery companies from domestic document delivery, subject them to additional taxes to benefit China Post, and could -- according to industry estimates -- cost FedEx and UPS hundreds of millions of dollars. The exclusion of foreign express delivery companies from document delivery raises questions as to whether the regulation is consistent with China's WTO commitments on national treatment and market access. Timing is short, with National People's Congress (NPC) passage possible by early January, and industry is doing a full-court press to persuade the NPC at a minimum to delay passage to permit more dialogue.

¶12. Building on earlier efforts, Mission has already formed an inter-agency team to plan and implement an integrated strategy to press U.S. concerns with the Chinese Government and has proposed to a very receptive EU mission (activated by DHL and TNT) that we closely coordinate efforts. In addition, we recommend strongly that involved Washington agencies: 1) prepare official comments on the draft law for submission to the NPC through official channels before the November 30 deadline; 2) complete legal analysis of the WTO implications as rapidly as possible; and 3) seek opportunities to raise this issue in the coming weeks in high-level meetings. End Summary.

Draft Postal Law Confirms Industry Earlier Concerns

¶13. (SBU) While the public release of the draft revision after its first NPC reading on October 28 provided a first look at actual text, rumors and sightings of some earlier iterations already had sparked an international campaign by potentially affected express delivery firms to prevent possible exclusion from the letter/document market. Industry efforts have been paralleled by USG interventions, both by high-level visitors and by Mission officials. Previously available information indicated China would exclude all private companies, both foreign and domestic, from the "document" express delivery market, leaving "document" delivery to be defined within the scope of the monopoly reserved for China Post. As a result, some foreign firms and analysts had been focused primarily on whether China's inclusion of document delivery in the scope of the China Post monopoly was consistent with its WTO obligations. Although China's accession commitment included a postal monopoly exception, it also contained a commitment not to roll back existing market access.

¶14. (SBU) The finally-revealed draft postal law confirms many of the

anticipated concerns of U.S. and European express delivery companies regarding the scope of the monopoly reserved for China Post. However, the draft also raises a second, even more troubling issue: the draft law explicitly excludes foreign companies from engaging in document delivery but is silent on domestic private firms. The relevant language in the draft comes in Article 50:
"Foreign-invested enterprises are forbidden to invest or operate domestic express delivery of letter articles." Another principal area of concern is a vague definition of the postal monopoly that could potentially prevent express delivery companies from delivering documents. Article 54 stipulates that "the express delivery enterprise shall not undertake the express delivery of letter articles exclusively undertaken by the postal enterprises, or the delivery of government documents," and Article 55 stipulates that "the express delivery enterprises shall not pack letter articles and deliver them as parcel." Finally, Article 19 would establish a universal postal service fund that would potentially subject express delivery companies to additional taxes to benefit China Post.

¶5. (SBU) The NPC has already completed the first reading of the draft law, and industry sources report that the second reading will take place in December, perhaps simultaneously with the third reading. The law could be approved as early as January 2009. The Mission has been engaged on this issue since industry concerns first arose and has now formed an inter-agency team to implement an accelerated lobbying strategy that will focus on the NPC while targeting other relevant bodies as well.

Draft Postal Law Inconsistent with WTO Commitment

¶6. (SBU and Business Sensitive) The draft postal law may be inconsistent with China's WTO commitments. In particular, allowing

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Chinese express delivery companies to operate but excluding foreign express delivery companies seems to violate the principle of national treatment. Even if China applies the exclusion to both foreign and domestic private firms, the definition of the scope of the monopoly may represent a roll-back of actual market access that was available at the time of China's WTO accession. We understand that private Chinese companies were participating, albeit unlicensed, in this market at the time of accession. Interestingly, our EU contact shared in confidence that Brussels lawyers are now examining a pre-accession document held by one European express delivery company that reportedly contains Commerce Ministry written approval for express document delivery. (Note: Our EU contact requested that we not share this information with industry. End Note.)

EU Shares U.S. Concerns and Plans Active Lobbying Effort

¶7. (SBU) European express delivery companies DHL and TNT are active in the Chinese market and could see their investments and operations significantly affected if the postal law is enacted. In a November 19 meeting, an EU diplomat told EmbOffs that the EU shares the same concerns as the U.S. and is preparing to submit official comments to the NPC. He said EU lawyers are still reviewing the WTO implications based on the monopoly situation at the time of accession, as well as considering a legal argument that defines express delivery service as a "courier service" and draws a distinction between private letters and commercial documents. The EU diplomat reports that former EU Trade Commissioner Peter Mandelson raised the issue of the draft postal law during his September 24 meeting with Chinese Minister of Commerce Chen Deming. The EU is now focusing its lobbying efforts on the NPC and considering asking European Parliament legislators to contact their Chinese counterparts. Besides submitting comments on the draft law to the NPC prior to November 30, the local EU mission also plans to express its concerns in meetings with Chairmen of the NPC Law Committee and Finance and Economic Committee.

Japan Remains on the Sideline

¶8. (SBU) A Japanese diplomat told EmbOffs on November 19 that Japan is not lobbying the NPC to revise the draft postal law and not planning to take any action at this point. Although several

Japanese express delivery companies are active in China, the Japanese diplomat reported that these companies have not expressed their concerns about the draft postal law to the Japanese Embassy.

Action Request

19. (SBU) Action Request: 1) Post strongly recommends appropriate USG agencies submit official comments to the NPC before the November 30 deadline. The United States has consistently urged the Chinese to make their legislative process more transparent, and the NPC has responded by posting the draft postal law on its website and seeking public comments. Not commenting on the draft postal law would send the wrong message about transparency and undercut future arguments the U.S. would make after the law is passed. 2) Post recommends involved Washington agencies complete legal analysis of the WTO implications as soon as possible and, if legal analysis permits, specifically raise arguments about the draft law's inconsistencies with China's WTO commitments. 3) Post recommends appropriate USG agencies seek opportunities in the coming weeks to raise this issue at high-level meetings between U.S. and Chinese officials. The upcoming Strategic Economic Dialogue (SED) could provide opportunities for USG officials to press the Chinese to revise the postal law.

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